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MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1540

CITIZENS ORGANIZED TO PRESERVE
OUR ENVIRONMENT, *et al.*,
Petitioners,

vs.

RICHFIELD BOARD OF ZONING APPEALS
and
OHIO SPORTS CENTER, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT OHIO SPORTS CENTER, INC. IN OPPOSITION

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The instant Petition merely presents issues of fact limited to the particular circumstances of the proceedings below and having no general significance. Moreover, the Petition is without merit since Petitioners were given adequate notice of the proceeding before the zoning board and any possible defect in such notice was waived or cured by the Petitioners' participation in the proceedings before the board and the Court of Common Pleas.

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QUESTION PRESENTED

Whether the notice of a public hearing before the Richfield Township (Ohio) Board of Zoning Appeals to consider the granting of a zoning variance for a particular property contained sufficient facts as to the nature of the proceeding to constitute adequate notice to the public under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

* Under Ohio law, the Board of Zoning Appeals is not a proper party and cannot be a party to a proceeding to review its decision. The appellees in the proceedings below were the Richfield Township Board of Trustees, the Richfield Zoning Inspector, and Ohio Sports Center.

COUNTER-STATEMENT OF THE CASE

The insubstantial nature of the instant petition is best demonstrated by a factual statement of the proceedings below.

On July 17, 1971, Respondent Ohio Sports Center, Inc. applied for a permit to construct a sports coliseum on a 100-acre site in Richfield Township, Ohio, zoned as a C-1 local commerical district. The permit was denied by the Township Zoning Inspector and Ohio Sports Center appealed to the Township Board of Zoning Appeals, requesting variances to permit the construction.

Pursuant to this appeal, the Board published the following notice of a public hearing to consider the question of whether the variances should be granted:

> A public hearing will be held before the Richfield Township Board of Zoning Appeals on the 23rd. day of August, 1971 at 7 o'clock P.M. at the Richfield Elementary School, 4315 W. Streetsboro Rd., Richfield, Ohio, for the purpose of hearing the following, relative to the Application of Ohio Sports Center, Inc. to erect a Colosseum on its property, approximately at the northwest corner of the intersection of Ohio Route 303 and Interstate 271, Richfield Township, Summit County, Ohio, Property located in a Commercial Zone:
>
> Request for Variance from Height Limitations
> Request for Variance from access limitations
> Interpretation regarding side yard usage and variance on same if necessary.

Since the proposed coliseum had received considerable publicity, Petitioner C.O.P.E. was formed even prior to the time the building permit was requested, for the specific purpose of opposing construction of the coliseum. Even before the Zoning Inspector denied the permit, C.O.P.E.'s attorneys wrote to the Board stating that C.O.P.E. intended to participate in the forthcoming pro-

ceedings to determine whether a use variance for the coliseum should be granted. After the permit was denied, C.O.P.E. and two of its members (the Petitioners) filed an appeal to the Board* urging that the coliseum was not a permitted use in a C-1 district. At C.O.P.E.'s request, its appeal was consolidated with that of Ohio Sports Center. In demanding the consolidation, C.O.P.E.'s attorneys, by letter to the Board prior to the hearing, asserted that "the primary issue" to be resolved was "proper land use in a C-1 zone," and that this was "the threshold issue" that the Board was required to decide.

Both appeals were then heard at a public hearing at which all persons present, including the members of C.O.P.E. and their attorneys, were given a full opportunity to testify, produce evidence, cross-examine witnesses and present argument on any and all matters relating to the proposed use. In fact, before closing the hearing the Board chairman specifically asked C.O.P.E.'s attorneys if they had anything further to offer. They replied that they had nothing more and were resting their case. The notoriety of the proceedings is demonstrated not only by the large number of persons attending the hearing, but by the fact that at the hearing petitions signed by 695 adult residents of the Township (out of a total population of only 4900) were submitted in favor of the coliseum. In addition, the record before the Board shows that the coliseum had been approved prior to the hearing by the Township Board of Trustees, the Board of Park Commissioners, the Area Progress Board of Summit, Portage and Medina Counties, the Tri-County Regional Planning Commission and the Richfield Village Council.

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* Under Ohio law "any person aggrieved" by a decision of the Zoning Inspector can appeal to the Board of Zoning Appeals. Ohio Rev. Code § 519.15 (set out in the Appendix).

The Board of Zoning Appeals unanimously granted the variances sought by Ohio Sports Center, subject to a number of specific conditions assuring full protection to the community. The detailed findings of fact by the Board, all of which are substantially supported by the record, established the propriety of the Board's action. Indeed, on appeal, both the Common Pleas Court and the Court of Appeals, after reviewing the record before the Board, held that the facts were such that the Board would have abused its discretion and denied Ohio Sports Center its constitutional rights had it denied the use variance.

At the hearing before the Board, Petitioners, in the face of the language of the notice stating that the erection of a coliseum would be considered and despite their own appeal on the use issue, took the position that since the notice of the public hearing did not specifically state that Ohio Sports Center was seeking a use variance, they would be denied due process if the Board considered this question. However, when the Board went ahead and received evidence on this issue, C.O.P.E.'s attorneys proceeded to cross-examine witnesses and present argument. At no time did they request a continuance or a further opportunity to present evidence. Rather, when offered such an opportunity by the Board, they asserted that they had nothing further to present.

Having lost before the Board, the Petitioners sought review in the Court of Common Pleas (the trial court level in Ohio). Under Ohio law, any defect in the proceedings before the Board gives the appellant the full legal right before the Court of Common Pleas to present evidence on the merits and to cross-examine the witnesses who testified below. Ohio Rev. Code § 2506.03 (set forth in the Appendix). Petitioners not only did not request the opportunity to present any such evidence, they agreed that the Court of Common Pleas

should base its decision on the record before the Board. The Court of Common Pleas affirmed the decision of the Board and was in turn affirmed by the Court of Appeals. The Ohio Supreme Court, *sua sponte*, dismissed Petitioners' appeal on the ground that it involved no substantial constitutional question. (The opinions of all three courts are printed in the Appendix to the Petition for Writ of Certiorari.)

REASONS FOR DENYING THE WRIT

The instant Petition presents a question of fact as to whether the wording of the notice set out above, under the peculiar circumstances of this case, contained sufficient information so that the Township Board of Zoning Appeals acted within the Constitution when it granted Ohio Sports Center the right to use its property for a coliseum. A further factual question that must be resolved is whether by filing their own appeal as to the use issue, by appearing and participating at the public hearing, and by failing to exercise their right to present evidence in the Court of Common Pleas, Petitioners waived any possible defect in the original notice.

Therefore, regardless of the outcome of this matter, should this Court decide to hear it, the decision will have no general importance, will involve no significant point of law, will establish no useful precedent and will resolve nothing but very narrow factual issues pertinent only to this particular case. This is not a matter for this Court to concern itself, especially since the Petitioners have raised the same issue in three successive courts below, and it has been decided adversely to them in each instance.

Moreover, there is no genuine or substantial issue of federal—or of state—law involved in this case. The position of Petitioners is completely without merit.

Petitioners are members of the general public having no direct interest in the land for which the variance was requested. The notice, which Petitioners concede they received, gave a specific description of the date, time and place of hearing, and also clearly stated that the purpose of the hearing was to consider the application of Respondent to erect a coliseum on its property. The notice gave a specific description of the property and its location.

Certainly, in the context of a notice to the general public of a proceeding before a zoning board, the notice at issue fully complies wth the requirements of due process.

Petitioners are confusing the requirements of common law form pleading with the due process requirements of a public notice. As the Ohio Court of Appeals stated in *Roper v. Board of Zoning Appeals,* 115 Ohio App. 62, 67, 184 N.E.2d 439 (1961), aff'd, 173 Ohio St. 168, 180 N.E.2d 591 (1962):

> "The law does not, nor should not, require the particularity of pleadings or summonses as is required in courts of law; and the essential requirement is that the subject matter of the controversy be described with reasonable certainty, and that all persons who may be damaged by the action of the board be given the right to become actual participants in the proceedings and to protect their rights as parties."

This standard was complied with in the instant case. Certainly, due process requires no more.

Petitioners would have this Court hold that due process imposes not merely a requirement of fair and reasonable notice, but rather a rigid requirement of form pleading in public notices published by a zoning board—a standard which is no longer required, if it ever was, even in judicial proceedings. Respondent considers it self-evident that this is not the law.

But even if this were not clear, the Petitioners' position that the Board could not consider the question of use variance ignores the other facts in the case. Petitioners themselves filed a separate appeal on the question of proper land use and requested that it be consolidated with the appeal of Ohio Sports Center. Petitioners, represented by counsel, appeared at the hearing, presented evidence and cross-examined witnesses. When the Board indicated that it would be willing to give Petitioners a further opportunity to present their case, they asserted that they had nothing further to offer and were resting their case. Before the Court of Common Pleas, where Petitioners had the right to present evidence, they declined to do so and instead agreed that the case should be decided on the record below. Thus, the record clearly establishes that even if there were a defect in the original notice, this has been waived.

In summary, therefore, the Petitioners have raised only narrow factual issues of no general significance beyond this immediate case. Moreover, the notice was adequate on its face, and the Petitioners appeared with counsel and fully participated in the hearing before the Board. They had a further full opportunity to present evidence on the merits in the Common Pleas Court—an opportunity which they expressly declined to exercise.

CONCLUSION

For the reasons stated the Petition should be denied.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

§ 519.15. Rules, organization and meetings of zoning appeals board.

The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board of zoning appeals shall be held at the call of the chairman, and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths, and the board of zoning appeals may compel the attendance of witnesses. All meetings of the board of zoning appeals shall be open to the public. The board of zoning appeals shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of township trustees and be a public record.

Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.

The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days' notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more

newspapers of general circulation in the county at least ten days before the date of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney.

§ 2506.03. Hearing of appeal.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) To present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use

the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript, conclusions of fact supporting the order, adjudication or decision appealed from;[,] in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.